

**BEFORE THE DIRECTOR OF THE  
DEPARTMENT OF PESTICIDE REGULATION  
STATE OF CALIFORNIA**

In the Matter of the Decision of  
the Agricultural Commissioner of  
the County of Stanislaus  
(County File No. 50-0506-013)

Administrative Docket No. 130

**DECISION**

**Patterson Flying Service  
P.O. Box 692  
Patterson, CA 95363**

Appellant /

**Procedural Background**

Under Food and Agricultural Code (FAC) section 12999.5 and California Code of Regulations (CCR), title 3, section 6130, county agricultural commissioners (CACs) may levy a civil penalty up to \$5,000 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the Stanislaus CAC found that the appellant, Patterson Flying Service, committed one violation of the State's pesticide laws and regulations pertaining to FAC section 12973. The commissioner imposed a penalty of \$5,000 for the violation. The commissioner also ordered that Patterson reimburse the medical costs of acute illness and injury of known injured parties and submit to the Director a written plan on how appellant will pay the injured parties, and medical providers for the immediate medical costs.

Patterson appealed from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation (DPR). The Director has jurisdiction in the appeal under FAC section 12999.5.

**Standard of Review**

The Director decides matters of law using her independent judgment. Matters of law include the meaning and requirements of laws and regulations. For other matters, the Director decides the appeal on the record before the Hearing Officer. In reviewing the commissioner's decision, the Director looks to see if there was substantial evidence, contradicted or uncontradicted, before the Hearing Officer to support the Hearing Officer's findings and the commissioner's decision. The Director notes that witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the Hearing Officer.

The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion, even though other conclusions might also have been reached. In making the substantial evidence determination, the Director draws all reasonable inferences from the information in the record to support the findings, and reviews the record in the light most favorable to the commissioner's decision. If the Director finds substantial evidence in the record to support the commissioner's decision, the Director affirms the decision.

### **Factual Background**

Appellant stipulated at hearing that on September 2, 2005, he made an aerial application of the organophosphate pesticide Dimethoate to a field of dried lima beans on the Farinha Farms property adjacent to the property and home of complainant Elena Ruiz. Ms. Ruiz testified that she walked outside of her house into the barnyard, was engulfed in a fog of pesticide, and heard a plane overhead. She began to experience shortness of breath and chest discomfort. She called the local emergency room and was told to take a shower immediately and to find out what chemical she had been sprayed with. Ms. Ruiz testified that she discovered that Patterson was making the application, called Patterson, and learned that the application was of Dimethoate and Warrior.

At 8:50 a.m., Ms. Ruiz checked into the emergency room of Emanuel Medical Center. The doctor's initial impression was noted to be acute dyspnea (shortness of breath) due to chemical irritation. Ms. Ruiz was treated with atropine, monitored, given a prescription for an inhaler, and released at 2:45 p.m. with instructions to return if her symptoms worsened. The next afternoon at 12:48 p.m., she returned to the emergency room complaining of difficulty breathing, headache, diarrhea, sore throat, and burning in her throat and chest. She was again monitored, advised to fill the prescription, and was released at 3:15 p.m. with instructions to follow up with her doctor or return if she worsened. She visited Golden Valley Health Center on September 7, 2005, complaining of difficulty breathing. She also complained that the inhaler made her dizzy.

On September 6, 2005, the CAC received a telephone complaint from Ms. Ruiz regarding the incident. The CAC investigator took samples at the Ruiz residence on September 8, 2005, and submitted those samples to DPR's Center for Analytical Chemistry. The laboratory results came back positive for Dimethoate and Warrior (Lambda Cyhalotrin).

The "Directions for Use" found on both labels of the two pesticides applied on September 2, 2005, contain the following language: "Do not apply this product in a way that will contact workers or other persons, either directly or through drift." The CAC concluded that the

appellant did not follow the directions for use, that Ms. Ruiz was exposed to the chemical Dimethoate, suffered an actual health effect as a consequence of that exposure, and that a Class A fine of \$5,000 was warranted.

### **Relevant Statute and Regulation**

FAC section 12973 reads as follows:

“The use of any pesticide shall not conflict with labeling registered pursuant to this chapter which is delivered with the pesticide or with any additional limitations applicable to the conditions of any permit issued by the director or commissioner.”

When levying fines, the CAC must follow the fine guidelines in CCR, title 3, section 6130. Under section 6130, violations shall be designated as “Class A,” “Class B,” and “Class C.” A “Class A” violation is one which created an actual health or environmental hazard; is a violation of a lawful order of the CAC issued pursuant to FAC sections 11737, 11737.5, 11896, or 11897; or is a violation that is a repeat Class B violation. The fine range for Class A violations is \$700-\$5,000. A “Class B” violation is one that posed a reasonable possibility of creating a health or environmental effect, or is a violation that is a repeat Class C violation. The fine range for Class B violations is \$250-\$1,000. A “Class C” violation is one that is not defined in either Class A or Class B. The fine range for Class C violations is \$50-\$500.

### **Appellant’s Allegations**

The appellant asserted that the CAC does not have jurisdiction to levy a penalty against him by asserting that the CAC and DPR are bound by the Administrative Procedures Act (APA) hearing procedures found in California Government Code (GC) sections 11400 et. seq, and are required by the APA to provide a formal hearing before the Office of Administrative Hearings (OAH.) The appellant also asserts that the CAC and DPR failed to provide rules and procedures of the conduct of the hearing as required in GC section 11425.10, and failed to provide a qualified hearing officer as required in GC section 11502.

In addition, the appellant asserted that the decision was not supported by sufficient findings, that the record was barren of evidence to support proper findings had they been made, and that the CAC failed to meet its burden of proof. The Appellant also asserts that no evidence was provided to prove that the Dimethoate pesticide was registered and that, therefore, the failure to followed registered label instructions was not proven.

Factually, appellant asserted that Ms. Ruiz was not exposed to pesticidal spray. As proof of that fact appellant argued that no blood tests results proved exposure to an organophosphate pesticide, that he did not see Ms. Ruiz in the yard, and it simply comes down to her word against his.

The CAC levied a \$5,000 fine for the violation because appellant's failure to follow label precautions resulted in an actual illness. Appellant asserts that the evidence does not prove a substantial drift of pesticide off of the target site, that the label(s) do not carry statements that exposure to the pesticide(s) constitute an actual health hazard, and that there is no evidence that Ms. Ruiz suffered an actual health hazard so that a Class A fine is not justified.

### **The Hearing Officer's Decision**

The Hearing Officer incorporated the fourteen stipulations agreed to by the parties at hearing into his first finding of fact and made three additional findings of fact. Based on appellant's stipulation that he applied the pesticides in question on September 2, 2005, by airplane, and based upon the Hearing Officer's findings that Ms. Ruiz gave credible testimony that she was enveloped by a fog of pesticide from the plane and the fact that her testimony is corroborated by the medical records, the Hearing Officer found that appellant failed to apply the pesticide according to the label language which required that the product be applied in a way that will not contact workers or other persons, either directly or through drift. The Hearing Officer explained that the violation of FAC section 12973 did not require a finding of substantial drift as required by FAC section 12972. The Hearing Officer went on to find that the application would also have violated FAC section 12972 because, in his judgment, the drift was substantial.

With regard to the fine level, the Hearing Officer found that Ms. Ruiz was exposed to substantial drift, that label language on each pesticide establishes that exposure to either pesticide constitutes an actual health hazard, and that Ms. Ruiz experienced symptoms and suffered health effect as a consequence of exposure. Thus, the Hearing Officer found that the consequences of appellant's failure to apply the pesticides according to label precautions resulted in actual illness and justified a \$5,000 fine.

### **The Director's Analysis**

#### **Jurisdiction of the CAC**

Appellant has challenged the jurisdiction of the CAC to administer the commissioner's civil penalty action authority found in FAC section 12999.5. Since 1985, CACs have levied penalties for pesticide use violations under this statute. The statute also sets forth an informal

procedure by which violators can challenge the CAC's decision in a noticed hearing. The violator is given notice of the violation in the form of a Notice of Proposed Action (NOPA) that contains the grounds for the violation, the amount of penalty, and notice of the right to request a hearing. Should the violator request a hearing, the statute provides a right to review the CAC's evidence, the right to present evidence on his or her own behalf at hearing, and the right to appeal any adverse ruling to the DPR Director. FAC section 12999.5 authorizes a local agency, the CAC, to levy a civil penalty.

Appellant asserts that the provisions of the APA require the CAC to provide a formal hearing before OAH prior to levying a civil penalty. Appellant is incorrect in this assertion. The hearing authorized by FAC section 12999.5 does not relate to a state agency action, nor is the hearing mandatory. In fact, a hearing is required only if requested by the violator within 20 days of receipt of a NOPA.

GC section 11410.20 provides that *except as otherwise provided by law*, (emphasis added) the chapter (4.5) applies to all state agencies.<sup>1</sup> The authority for the commissioner to provide a civil penalty action hearing and the required procedure is found in a FAC statute, thus exempting the CAC from following the APA. In addition, GC section 11415.20 sets forth that where a specific state statute conflicts with a provision of Chapter 4.5, the state statute controls. FAC section 12999.5 is the controlling statute. Lastly, GC section 11410.30 specifically exempts local agencies, such as the CAC, from the provisions of the chapter. The CAC is not created by joint action of the state and one or more local agencies as argued by appellant. The CAC is appointed by each county board of supervisors (FAC section 2121.) GC section 11410.30(c) does not apply.

Appellant asserts that he was further denied due process by the CAC's failure to provide proper rules and procedures of the hearing (GC section 11425) and failure to provide a qualified hearing officer (GC section 11502). Because both of these provisions are APA provisions and inapplicable to this case, appellant's argument is without merit for the same reasoning as above.<sup>2</sup>

A good discussion of the requisite due process in an administrative hearing is contained in the case of *Lieblein v. Shewry (California Department of Health Services)*. "Due process is the opportunity to be heard at a meaningful time and in a meaningful manner (citation omitted)." Due process is "flexible and calls for such procedural protections as the particular situation demands." Administrative hearings are essential to carry out the mandates of an administrative agency and to protect scarce fiscal and administrative resources. FAC section 12999.5 allows the

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<sup>1</sup> Chapter 4.5 addresses the procedures to be followed in providing an administrative hearing before OAH.

<sup>2</sup> The hearing tapes contain a conversation between appellant and the Hearing Officer regarding the hearing procedures. Appellant was asked if he had any questions about the rules and procedures. He indicated that he did not.

CAC to take quick action against a pesticide use violator to protect the public health and environment. The statute also provides full due process to violators, in a local, informal, inexpensive, and efficient manner. Requiring the CAC to conduct evidentiary hearings before the OAH prior to levying a civil penalty for a pesticide use violation instead of an informal hearing before the local administering agency would create a significant burden on the CAC, as well as violator. This is the burden that the specific authority and procedures of FAC section 12999.5 avoids.<sup>3</sup>

The Director finds, as a matter of law, that the CAC had authority and jurisdiction to conduct this civil penalty hearing and to levy the civil penalty against appellant. The Director also finds that appellant was provided notice and an opportunity to be heard and was thus provided due process.

### **Evidentiary Allegations**

Appellant asserts that the Hearing Officer's decision is not supported by sufficient findings and that the findings are not supported by the evidence. Appellant also asserts that the CAC did not meet its burden of proof. These allegations will be addressed together below.

Appellant's first objection to the Hearing Officer's findings is that the CAC failed to prove that the Dimethoate label was registered so that a violation of FAC section 12973 was not proven. Appellant argues that FAC section 12973 requires that "labeling registered pursuant to this chapter" must be proven as an element of the violation. At hearing, appellant stipulated that he applied Dimethoate on September 2, 2005, and that the Dimethoate EPA registration number was 51036-00198. The record contains a copy of the pesticide use report appellant filed that indicated that he applied Dimethoate EPA Registration number 51036-00198. Since the CAC did not charge appellant with applying an unregistered pesticide, it can be reasonably inferred that the pesticide was registered. The CAC also provided the Director with a copy of the label that has been stamped "DPR-approved." Appellant did not raise this defense at hearing or provide any evidence that would rebut the reasonable inference that can be drawn from the record. The argument is without merit.<sup>4</sup>

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<sup>3</sup> Appellant cites the case of *California Youth Authority v. State Personnel Board* as authority for his assertion that a hearing under the APA must be held in this case. The *CYA* case does not support the assertion. The SBP is required by statute to follow APA rules when addressing a disciplinary action against a state employee. The *CYA* court determined that it was not bound by the ALJ's credibility findings since the ALJ's credibility determinations were not related to witness demeanor, manner, or attitude as required by APA provisions (GC section 11425.50.)

<sup>4</sup> Appellant asserts that the Hearing Officer made "implied findings" and cited the case of *Topanga Association v. County of Los Angeles* to support the argument. The Director rejects this argument and finds that the Hearing Officer's findings are not implied but are in fact explicit and supported by substantial evidence.

Appellant's second objection to the Hearing Officer's findings is the finding that substantial amounts of the pesticides Warrior and Dimethoate drifted from the target site onto the Ruiz property. The finding of a violation of FAC section 12973 does not require proof of substantial drift. However, the Hearing Officer did find that substantial drift occurred. There is sufficient evidence in the record to support this finding. The laboratory results of samples taken six days after the exposure show the presence of Warrior and Dimethoate. County advocate and sworn witness Kevin Gonsalves testified that this finding six days later is significant, especially in view of the toxicity of the pesticides. Mr. Gonsalves presented testimony of the relatively small amount of the pesticide products in the tank mix as proof of the strength and toxicity of the pesticides as well as the statements on the label to avoid exposure, which can cause health effects from exposure to the eyes, skin, respiratory, and upon ingestion. Mr. Gonsalves also testified that at the detection levels, Ms. Ruiz could have experienced health effects. Contrary to appellant's assertion, the finding that substantial drift occurred was explicit, not implied, and was supported by the record.

Appellant challenges the finding of the Hearing Officer that Ms. Ruiz's testimony that she was exposed to pesticides and suffered health effects was credible. The finding of credibility is in the exclusive province of the Hearing Officer. The Hearing Officer personally observed Ms. Ruiz and considered corroborating evidence in reaching the determination. The Director will not review the credibility determination. Moreover, the record contains ample evidence in the form of laboratory results, Ms. Ruiz's testimony, and medical records to support the Hearing Officer's finding that Ms. Ruiz was exposed to Dimethoate and suffered actual health effects, regardless of the lack of blood evidence of organophosphate poisoning.

With regard to the Hearing Officer's findings to support the fine level, the appellant repeated his argument that the finding that Ms. Ruiz was exposed to substantial drift was not supported by evidence. Once again, this finding is not necessary to support a FAC section 12973 violation or the determination that a Class A fine was justified. And as discussed above, the record supports the Hearing Officer's finding that Ms. Ruiz suffered an actual health effect from this exposure. The Director finds that the Class A fine is justified.

Lastly, appellant alleges that the CAC did not meet its burden of proof. However, the allegation was made in conclusory terms and did not include any discussion of how the burden was not met. The Director will not address the issue further.

The Director finds that the Hearing Officer made sufficient findings of fact to support his determinations and those findings of fact were supported by sufficient evidence.

**Conclusion**

The commissioner's decision that Patterson violated FAC section 12973 is supported by substantial evidence. The commissioner's decision to levy a fine of \$5,000 (Class A) and order for reimbursement of medical costs is well within his discretion under 3 CCR, section 6130.

**Disposition**

The commissioner's decision is affirmed. The commissioner shall notify the appellant how and when to pay the \$5,000 fine, and how and when to submit a plan to reimburse medical costs to the Director.

**Judicial Review**

Under FAC section 12999.5, the appellant may seek court review of the Director's decision within 30 days of the date of the decision. The appellant must file a petition for writ of mandate with the court and bring the action under Code of Civil Procedure section 1094.5.

**STATE OF CALIFORNIA  
DEPARTMENT OF PESTICIDE REGULATION**

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
Mary-Ann Warmerdam, Director